

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
ERIE DIVISION

DEMETRIUS BROWN,
Plaintiff,

v.

U.S. JUSTICE DEPARTMENT,
BUREAU OF PRISONS, FCI MCKEAN,
WARDEN JOHN J. LAMANNNA,
REGIONAL DIRECTOR D. SCOTT
DODRILL, MEDICAL DIRECTOR
NEWTON E. KENDIG, DIRECTOR
HARLEY G. LAPPIN,
Defendants.

Civil Action No. 04-379E

PLAINTIFF'S MOTION OPPOSING DEFENDANTS'
REQUEST TO STRIKE DEMAND FOR TRIAL BY JURY

COMES NOW, DEMETRIUS BROWN, herein as Plaintiff, proceeding Pro-Se, hereby moves this Honorable Court, the United States District Court for the Western District of Pennsylvania, in opposition to Defendants' request to Strike Demand for Trial by Jury. In support, Plaintiff affirms that;

1. Plaintiff has filed a complaint in the above-captioned action under the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), 2671 et. seq. In the complaint, Plaintiff seeks \$10 million dollars in damages for personal injuries caused by Plaintiff's exposure to second hand smoke while incarcerated and under the authority of the above named Defendants.

2. Plaintiff subsequently filed a Motion to Amend Complaint Correcting Typographical Error and Adding Cure to Jurisdictional Deficiency, which was granted by Order dated May 9, 2005.

3. At the time Complaint and Amended Complaint were filed, Plaintiff demanded a trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure.

4. And now, in conjunction with Plaintiff's demand for jury trial, Plaintiff submits simultaneously with this opposition, a Motion with leave to Second Amend Complaint with Jurisdictional Statement adding in addition to FTCA jurisdiction, a Federal Question Jurisdiction against Defendants in their individual capacities for a "Bivens Claim" in violation of the Eighth and Fourteenth Amendments. See **Motion with leave to Second Amend Complaint**.

5. Here, under Federal Rules of Civil Procedure, Rule 38(b), a right to trial by jury exists under a "Bivens Claim" for violations under the Constitution.

6. But, even so, "in all actions not triable of right by a jury the court upon motion of its own initiative may try any issue with an advisory jury..."See **Fed.R.Civ.P., Rule 39(c)**.

7. As well, "in actions against the United States... the Court, with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. Id. **Rule 39(c)**."

WHEREFORE, Plaintiff opposes Defendants' Motion to Strike Demand for Jury Trial and request that the Court issue an Order Denying said motion.

I, DEMETRIUS BROWN, hereby affirm and declare under penalty of perjury, 28 U.S.C. §1746, that the foregoing is true and correct.

2/6/06
Dated

Demetrius Brown